

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

August 9, 2011

In the Matter of MGC, Minor.

No. 302035

Oakland Circuit Court

Family Division

LC No. 10-771871-AY

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Respondent appeals as of right from an order that terminated his parental rights to the minor child, MGC, under MCL 710.51(6) of the Adoption Code. The order also allowed the child's stepfather, who is married to MGC's mother, to adopt MGC. We affirm.

The petitioner in a stepparent adoption proceeding must prove the requisite statutory factors under MCL 710.51(6) by clear and convincing evidence before a respondent's parental rights can be terminated. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001). This Court reviews the trial court's findings of fact under the clearly erroneous standard. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-697; 690 NW2d 505 (2004).

MCL 710.51(6) provides the following:

If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:

(a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

Thus, in order to terminate parental rights under MCL 710.51(6), the trial court must determine that both subsection (a) and subsection (b) are satisfied. *In re Hill*, 221 Mich App at 692.

Both subsection (a) and subsection (b) contain a two-year period, which commences on the filing date of the petition and extends backwards from that date for a period of two years or more. *Id.* at 689. Since the petition was filed on May 13, 2010, the two-year window applicable here encompasses from, at the latest, May 13, 2008, to May 13, 2010.

Because there was no support order entered in this case, the sole question at issue here concerning subsection (a) is whether respondent had the ability to support or assist in supporting MGC, yet failed or neglected to do so for at least two years leading up to the filing of the petition. *In re Newton*, 238 Mich App 486, 493; 606 NW2d 34 (1999). Here, it is undisputed that respondent failed to provide any support for MGC for at least two years before the filing of the petition. Although respondent paid \$300 per month in child support when MGC was living in Illinois, he failed to pay any child support or money for her care after MGC and her mother moved to Michigan in August 2004. For subsection (a) to be satisfied, it must also be established that the noncustodial parent had the ability to provide support. Here, respondent testified that he was employed as a regional sales representative, earning \$600 per week. Thus, the trial court's finding, that respondent had the ability to provide some support yet failed to do so, was well supported by the evidence and is not clearly erroneous.

Subsection (b) requires the petitioner to prove that the noncustodial parent had the ability to visit, contact, or communicate with the child, yet failed to do so regularly and substantially during the two-year window. *In re ALZ*, 247 Mich App at 273. Respondent had very little contact with MGC from May 2008 through May 2010. Immediately after the child and her mother moved from Illinois to Michigan in August 2004, respondent lost contact with MGC for several years and only regained contact with her after a chance meeting with the child's mother in August 2009. The only contact respondent had with MGC was through the exchange of emails and the sending of a birthday card. The record shows that respondent sent less than a dozen emails to MGC. These contacts spanned from November 24, 2009, to March 22, 2010, or approximately four months out of the statutorily defined two-year period. The trial court did not clearly err in finding that respondent failed to regularly and substantially have contact with MGC during this period.

Respondent argues that he initially lacked the ability to visit or communicate with MGC because he had no idea of her Michigan address. Contrary to respondent's assertions, there is no reason to believe that respondent could not have located MGC before August 2009. Petitioners and MGC had been living at the same Michigan address since August 2004, and petitioner-mother never changed her cell phone number after moving. Additionally, petitioner-mother gave respondent her husband's full name, so respondent could have located MGC through him. Furthermore, respondent could have asserted his rights for visitation and parenting time once he knew MGC and her mother were moving from Illinois to Michigan. Respondent was notified in June 2004 that they would be moving two months later, but he took no action in the Illinois courts. Respondent claims that he lacked the financial resources to hire an attorney and that he

was unaware that he could pursue parenting time through the legal system. However, respondent's own testimony belies this assertion:

Q. One of the reasons you knew [you had rights] is that it said so on the back of the acknowledgement of paternity, isn't that correct?

A. Yes.

Q. And another reason that you knew that is because you had already brought an action for visitation against your son Drake's mother in the court, isn't –

A. That is correct

Given that respondent had previously been involved in a custody action involving an older child, the trial court's finding, that his later assertions of being unaware of how to assert his rights lacked credibility, was not clearly erroneous. In considering the trial court's findings, "special deference" must be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *Draggool v Draggool*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Thus, respondent could have had regular parenting time and contact with MGC had he made the effort or pursued an action through the trial court. Respondent's half-hearted attempts to contact his daughter were due to his lack of effort and not his lack of ability.

Respondent also claims that he was unable to have any contact with MGC because petitioner-mother prevented any attempts at visitation. Respondent's reliance on *In re ALZ* in support of this argument is misplaced. In *In re ALZ*, the Court determined that, while there was no substantial contact between the noncustodial parent and the child during the two-year window, subsection (b) was nevertheless not satisfied because the noncustodial parent "lacked the ability to visit, contact, or communicate" with the child. *In re ALZ*, 247 Mich App at 273. There were two factors supporting this finding. First, the noncustodial parent's paternity had not been established until half way into the two-year window; thus, the noncustodial parent did not have a legal right to visit or communicate with the child until the paternity had been established at that later time. *Id.* at 268, 273. Second, the custodial parent took affirmative steps to prevent the noncustodial parent from contacting the child, such as outright refusing any visitation requests, *id.* at 267, 274, and moving her wedding date up four months to expedite the stepparent adoption process in order to prevent the noncustodial parent from having any contact with the child, *id.* at 268 n 2.

Neither of these factors is present in the instant case. Respondent's paternity was established from the start when he signed an acknowledgement of parentage. Additionally, petitioners never prohibited respondent from communicating with MGC or visiting. Respondent's attempt to characterize petitioner-mother (1) not providing a telephone number and (2) not providing an address as being equivalent to the actions of the custodial parent in *In re ALZ* is not well founded. First, failing to provide those pieces of information can hardly be considered "affirmative" acts. And more importantly, respondent already had the means of communicating with petitioner-mother because she never changed her cell phone number after moving to Michigan. Lastly, petitioner-mother even told respondent her address so that he could mail her information so that she could qualify for financial aid in Michigan. As a result, the facts of this case are quite distinguishable from the facts in *In re ALZ*. Accordingly, the trial court's

finding, that respondent had the ability to visit and communicate with AJH, is not clearly erroneous and should not be disturbed.

Finally, respondent argues on appeal that the trial court was biased in favor of petitioners. However, this issue was not raised in respondent's statement of the questions presented, as required by MCR 7.212(C)(5). Accordingly, we decline to consider it. See *Health Care Ass'n Workers Comp Fund v Bureau of Worker's Comp*, 265 Mich App 236, 243; 694 NW2d 761 (2005).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder

/s/ Donald S. Owens